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[SHOW] PROCEEDINGS AND ORDERS DATE: 121384

CASE NBR 84-1-05332 CSY
SHORT TITLE Smith, Steven DOCKETED: Aug 27 1984
VERSUS Illinois

Date	Proceedings and Orders
Aug 27 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Sep 27 1984	DISTRIBUTED. October 12, 1984
Sep 27 1984	Brief of respondent Illinois in opposition filed.
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 23 1984	Response requested. (Due November 2, 1984 - NONE RECEIVED)
Oct 23 1984	Record requested.
Oct 31 1984	Record filed.
Oct 31 1984	Certified miscellaneous record, 7 volumes, received.
Nov 13 1984	REDISTRIBUTED. November 21, 1984
Dec 3 1984	REDISTRIBUTED. December 7, 1984
Dec 10 1984	Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Rehnquist with whom The Chief Justice and Justice Powell join. Opinion per

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PETITION FOR WRIT OF CERTIORARI

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ORIGINAL

STEVEN SMITH, Petitioner 84-5332

vs.

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE ILLINOIS SUPREME COURT

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31pp

QUESTION PRESENTED FOR REVIEW

Whether Steven Smith's statement, "I would like to do that," (after being advised of his right to consult with a lawyer and to have a lawyer present during questioning) was sufficient to invoke his right to counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

STEVEN SMITH, Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE ILLINOIS SUPREME COURT

The petitioner, Steven Smith, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion issued by the Supreme Court of Illinois on June 29, 1984.

I.

OPINION BELOW

The opinion of the Supreme Court of Illinois has not yet been reported. A copy of the opinion is attached hereto as an appendix.

II.

JURISDICTION

The Illinois Supreme Court issued its opinion on June 29, 1984. This petition is filed within sixty days of the Illinois Supreme Court decision. The jurisdiction of this Court is invoked under 2o U.S.C. §1257(3).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V.

No person...shall be compelled in any criminal case to be a witness against himself,....

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

AMENDMENT XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IV.

STATEMENT OF THE CASE

Following a jury trial, Steven Smith was convicted of the offense of armed robbery and sentenced to a term of nine years imprisonment. The principal evidence against the defendant was a statement which he made during the course of a police interrogation, shortly after his arrest. In the statement, the defendant admitted his participation in the crime charged against him. The defendant filed a motion to suppress this statement, alleging that it was taken from him in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The trial court denied the defendant's motion. (R. 189-227)

The statement in question was elicited from the defendant in the following manner: On the evening of November 30, 1981, Steven Smith was arrested and immediately taken from his home to the Logan County Safety Complex. (R. 246-247) Within a few hours of his arrest, Mr. Smith was taken to an interrogation room where he was questioned by two police detectives. (R. 205) This was eighteen year old Steven Smith's first encounter with the criminal justice system.* (C. 126) Although his parents were waiting outside, the defendant was not allowed to communicate with them or even told of their presence. (R. 225) The interrogating police officers began their questioning as follows:

> Q. Okay. Steve, I want to talk with you in reference to the armed robbery that took place at McDonald's restaurant on the morning of the 19th. Are you familiar with this?
>
> A. Yeah. My cousin Greg was.
>
> Q. Okay. But before I do that I must advise you of your rights. Okay? You have the right to remain silent. You do not have to talk with me unless you want to do so. Do you understand that?
>
> A. She told me to get my lawyer. She said you guys would railroad me.
>
> Q. Do you understand that as I gave it to you Steve?

---

* Mr. Smith had been adjudicated delinquent for the offense of unlawful possession of a firearm. He had never before been arrested on criminal charges.

A. Yeah.

Q. If you do want to talk with me I must advise you that whatever you say can and will be used as evidence against you in court. Do you understand that?

A. Yeah.

Q. You have a right to consult with a lawyer and to have a lawyer present with you when you are being questioned. Do you understand that?

A. Uh, yeah. I'd like to do that.

Q. Okay. If you want a lawyer and if you are unable to pay for one a lawyer will be appointed to represent you free of cost. Do you understand that?

A. Okay.

Q. Do you wish to talk with me at this time without a lawyer being present?

A. Yeah and no. I don't know what's what really.

Q. Well, you either have to agree to talk with me at this time without a lawyer present and if you do agree to talk with me without a lawyer being present you can stop any time you want to.

A. All right. I'll talk to you.

(Vol. IV, People's Exhibit 17, pp. 1-2 (emphasis added))

Over the defendant's objection, the defendant's subsequent statements were admitted into evidence.

A divided panel of the appellate court affirmed the defendant's conviction, People v. Smith, 113 Ill.App.3d 305, 447 N.E.2d 556 (4th Dist. 1982), and the Illinois Supreme Court granted leave to appeal. On June 29, 1984, a four member majority of the Illinois Supreme Court held that the defendant did not make an effective request for counsel so as to invoke his rights under Miranda v. Arizona, People v. Smith, ___ Ill.2d ___, ___ N.E.2d ___ (1983). The three dissenters disagreed with the majority's conclusion that the defendant had not effectively requested counsel.

V.

REASON FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE ILLINOIS SUPREME COURT SEVERELY UNDERMINES THIS COURT'S DECISION IN EDWARDS V. ARIZONA, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). EDWARDS WILL BE EVISCERATED IF POLICE OFFICERS ARE ALLOWED TO IGNORE A DEFENDANT'S UNAMBIGUOUS REQUEST FOR COUNSEL AND THEN USE THE DEFENDANT'S SUBSEQUENT INDECISION TO UNDERCUT THE VALIDITY OF HIS INITIAL REQUEST.

At issue in this case is whether Steven Smith made an effective request for counsel at the outset of the November 30, 1981, interrogation session. An examination of the transcript of the interrogation shows that he did. Steven Smith was told that he had a right to a lawyer and he responded that he wanted one:

> INTERROGATING POLICE OFFICER: You have a right to consult with a lawyer and to have a lawyer present with you when you are being questioned. Do you understand that?
>
> DEFENDANT: Uh, yeah. I'd like to do that.

Steven Smith's request could hardly have been more clear. His earlier statements to the police officers do not reflect any uncertainty. Only moments before, upon being advised of his right to remain silent, the defendant had stated, "She told me to get my lawyer. She said you guys would railroad me."

Rather than calling a halt to the interrogation, the police officers ignored the defendant's plea for counsel. The interrogating officer finished reading the defendant his Miranda rights and asked the defendant if he understood.

Without making any reference to the fact that the defendant had just made a plain and unequivocal request for the assistance of counsel, the police officer inquired, "Do you wish to talk to me at this time without a lawyer being present?" Steven Smith expressed some confusion: "Yeah and no. I don't know what's what really."

At this point, the police officer informed Steven Smith that he had to talk to him -- but that he could cease the dialogue at any time:

> Well, you either have to agree to talk to me at this time without a lawyer present and if

> you do agree to talk with me without a lawyer being present you can stop any time you want to.

The defendant agreed to continue with the interrogation.

The Illinois Supreme Court did not dispute the fact that the defendant's initial statement, considered by itself or together with the statements which the defendant had previously made to the police, was a request for counsel in the most unambiguous and unequivocal of terms. However, the court refused to consider the defendant's request apart from the hesitation (and eventual capitulation) which the defendant expressed after the police officers ignored his entreaty. Accordingly, the Illinois Supreme Court concluded, "We believe that Smith's statements, considered in total, were ambiguous, and did not effectively invoke his right to counsel."

The defendant respectfully suggests that a grant of certiorari is warranted here in order to preserve the vitality of the Edwards decision in Illinois and in other states which might follow the lead of the Illinois Supreme Court. The point of the Edwards decision is that an initial, unambiguous request for counsel must be given effect apart from any subsequent expression of hesitation or eventual agreement to waive counsel. Edwards created a prophylactic rule. See Oregon v. Bradshaw, 451 U.S. 477, 103, S.Ct. 2830, 77 L.Ed.2d 405, 411 (1983). A defendant need make but one simple request in order to secure his right to counsel. Once invoked, the right to counsel cannot be waived unless subsequent communications are initiated by the accused. In this case, there is no dispute but that subsequent communications were initiated by the interrogating police officers. The defendant's statement should have been suppressed.

It appears that the Illinois Supreme Court was influenced by the ease with which the police officers persuaded Steven Smith to change his mind about the necessity of having counsel present. The irony of the decision is that the prophylactic rule of Edwards was drafted for the very reason that Steven Smith's conviction was affirmed: the ease with which a suspect can be influenced to withdraw a request for counsel. It is because of

the fragility of a suspect's resolve that Edwards accords an accused who has requested counsel more protection even than that provided by the knowing and intelligent waiver standard. When Steven Smith told the interrogating officers that he wanted an attorney, he was expressing his belief that he was not competent to deal capably with the police. Subsequent events proved him correct. The right to counsel is the single most important right assured by the constitution because it enables a person to exercise his other rights intelligently. For this reason, Edwards provides that once an accused has requested counsel he need not show an ability to resist any form of police persuasion, however subtle. He is protected from his own folly unless he reinitiates dialogue entirely of his own accord.

If Illinois courts are now to be allowed to use a defendant's eventual agreement to speak with police officers to undermine an initial, unequivocal request for counsel, the force of the Edwards decision will be lost. This case provides an excellent illustration of why it is that the prophylactic rule of Edwards should be strictly adhered to. As stated by Justice Simon, in dissent,

> I find it particularly significant that Smith, who was apparently in police custody for the first time in his life and admitted that he did not "know what's what," agreed to talk to the police only after he was told, ostensibly by way of explaining the Miranda warnings, that he had no other choice. Miranda warnings are designed to assist defendants in understanding and asserting their Fifth Amendment rights, not to provide another source of pressure on them to surrender those rights. Smith was entitled to receive his Miranda warnings without having them turned into an endurance contest at his expense [citation omitted] or a means of eliciting a confession from him against his will. When he indicated his desire to have counsel he should have been taken at his word, and further representations or warnings to him or discussion with him should have ceased.
>
> (Slip opinion, p. 10)

For these reasons, the defendant asks this Court to issue a writ of certiorari to the Illinois Supreme Court.

VI.

CONCLUSION

For the foregoing reasons, Steven Smith, petitioner, respectfully requests that a writ of certiorari be issued to the Illinois Supreme Court.

Respectfully submitted,

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EDITOR'S NOTE

PAGES A-1 thru A-7 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A

Docket No. 58422—Agenda 33—January 1984.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. STEVEN SMITH, Appellant.

JUSTICE CLARK delivered the opinion of the court:

This appeal requires us to determine whether the defendant was deprived of his right to counsel pursuant to the sixth amendment to the United States Constitution (U.S. Const., amend. VI). More specifically, we are asked to determine whether the defendant's confession should have been suppressed because he invoked his right to counsel before his confession was made. We are also asked to determine whether the defendant's conviction must be reversed because it is allegedly founded on hearsay statements of Terry Logan and Greg Williams which identified Steven Smith as the perpetrator. These statements were admitted as evidence and argued to the jury by the State's Attorney.

The defendant, Steven Smith, was arrested on November 30, 1981, and charged with the armed robbery of a McDonald's restaurant in Lincoln, Illinois. A Logan County jury found Smith guilty as charged, and Smith was sentenced to nine years in prison on April 20, 1982. A divided appellate court affirmed the defendant's conviction (113 Ill. App. 3d 305), and we granted defendant's petition for leave to appeal (87 Ill. 2d R. 315(a)). We now affirm the appellate court.

A reading of the testimony reveals the following facts. Shortly before 4 a.m. on November 19, 1981, Terry Logan and Greg Williams arrived at the McDonald's restaurant in Lincoln. Logan and Williams normally arrived for work at this early hour to prepare the restaurant for business. Logan and Williams entered the restaurant and were confronted by an armed male who wore a ski mask and brandished a large revolver. The armed man was standing inside the restaurant when Logan and Williams entered. He remained silent, and he used gestures to direct Logan to bind Williams' hands, feet and mouth with tape. He then forced Logan to bind his (Logan's) mouth shut with the tape, and the three men waited in silence for the arrival of another worker. Logan and Williams did not have the keys to open the store safe.

Karen Vale, another McDonald's employee, entered the restaurant and found Logan and Williams sitting on the floor near the safe. The masked man was standing near Logan and Williams. Vale was directed to open the safe, and approximately $2,600 was placed in a shake-mix box. Logan was ordered to tape Vale's hands together. The tape and store telephone were placed in the shake-mix box, and Logan was directed to take the shake-mix box to his car in the parking lot.

Logan and the intruder walked to the parking lot, and he directed Logan to enter the car and drive the two men to a deserted area near Lincoln. Logan testified that he then spoke for the first time, saying: "If you say anything to anyone, I will kill you. I will leave you $200 for your trouble. McDonald's is stupid." He left the $200, which was later recovered by the police. When they stopped at the designated area, he exited the vehicle, pulled Logan out of the car, and hit him in the forehead. Logan woke up later in the back seat of the car with his hands taped behind his back. None of the three initially identified the robber, but subsequently Logan identified the defendant,

Steven Smith, whom Logan had known prior to the robbery, as the perpetrator. Williams also told the police that the robber reminded him of his cousin, Steven Smith.

Steven Smith was arrested on November 30, 1981, and taken to the police station. Smith was questioned by Detective Coombs and Detective Vonderahe. The tape transcript was admitted into evidence over the objection of Smith's attorney, and it included a passage at the beginning of the tape:

"Q. Steve, I want to talk with you in reference to the armed robbery that took place at McDonald's Restaurant on the morning of the 19th. Are you familiar with this?

A. Yeah. My cousin Greg was.

Q. Okay. But before I do that I must advise you of your rights. Okay? You have a right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?

A. Uh. She told me to get my lawyer. She said you guys would railroad me. [The court reporter recorded the name as 'Chico' rather than 'she' when the tape was played to the jury. The transcript of the interrogation that was admitted into evidence referred to 'she.' The apparent discrepancy in names has not been discussed by the litigants, and is not germane to the resolution of this appeal.]

Q. Do you understand that as I gave it to you, Steve?

A. Yeah.

Q. If you do want to talk to me I must advise you that whatever you say can and will be used against you in court. Do you understand that?

A. Yeah.

Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?

A. *Uh, yeah. I'd like to do that.*

Q. Okay. If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?

A. Okay.

Q. Do you wish to talk to me at this time without a lawyer being present?

A. *Yeah and no, uh, I don't know what's what, really.*

Q. *Well. You either have to talk to me this time without a lawyer being present* and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.

A. All right. I'll talk to you then.

• • •

Q. Now, this is not game time, Steve. Games are over . . . You're eighteen years old and that's a hell of a way to start your life, my friend. Now I know that you done the McDonald's job.

A. No. I didn't.

Q. Now if you done it with somebody else, that's fine.

A. I didn't do the McDonald's job." (Emphasis added.)

Smith admitted more knowledge of the crime, and finally confessed:

"A. All right. I—all right. I committed it. I knew about the robbery. I knew about it long before it happened."

After this outburst, Smith returned to his earlier story, and insisted that he knew about plans to rob the restaurant, but did not commit the crime himself. The interview concluded at 9:10 p.m.:

"Q. You're puttin[g] your mother through hell. She just went through hell out there when we found all that s---. Your dad is quite upset.

A. I don't want to talk to you no more. I wanta get a lawyer. I ain't got no where to go. You guys have got all this evidence and all I got is three people. So what. That's gonna do me a lot of f---- good."

Logan's out-of-court identifications were presented to the jury as substantive evidence and received by the jury as substantive evidence. The transcript was also admitted into evidence, and the prosecutor referred to it throughout the trial and in his closing statement. On the day of the trial, prior to calling Logan and Williams as witnesses, the State's Attorney moved to have them declared hostile witnesses. In support of his motion, the State's Attorney noted the vacillation in Logan's pretrial statements. The trial court declared both Logan and Williams to be hostile witnesses.

At trial, Logan gave the following testimony:

"Q. And you told me, did you not, that the person who committed that armed robbery and who you saw in that car with a gun who pulled off the mask was, in fact, Steve Smith?

A. Yes, I said that.

* * *

Q. Didn't you tell me on November 19, 1981, that the armed robber, Steve Smith, gave you money in that car after the armed robbery was completed?

A. Yes.

Q. How much did you get?

A. $200.

Q. And it is that money that Steve Smith gave you to be silent and not give away his identity. Isn't that not correct?

A. It was not Steve Smith."

Williams was also called to the witness stand and he gave the following testimony:

"Q. Did this—Did this armed robber remind you of anybody?

A. No, he did not.

Q. Do you remember being interviewed by Detective Vonderahe at the Lincoln Police Department on Tuesday, December 1, 1981, at about 11:36 a.m.?

A. Yes.

Q. Do you remember Detective Vonderahe asking you then who did he remind you of and your answering, he reminded me of my cousin?

A. I think I remember that now."

The defendant argues that the trial court erred when it ruled that Logan and Williams were hostile witnesses, but we agree with the appellate court's reasoning on this point. Any error resulting from this ruling must be considered harmless error if Smith's confession was properly admitted into evidence.

We begin our discussion by noting that this appeal turns on the interpretation of two constitutional provisions: the right to silence (U.S. Const., amend. V), and the right to counsel (U.S. Const., amend. VI) (both made applicable to the State by the fourteenth amendment). (*Malloy v. Hogan* (1964), 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489; *Gideon v. Wainwright* (1963), 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792.) Such guarantees occasionally hamper the already difficult task of law enforcement, but they are essential elements of a free society. (See Traynor, *The Devils of Due Process in Criminal Detection, Detention & Trial* 23 U. Chi. L. Rev. 657 (1966).) Much of the world lives in an environment where the star chamber and secret police are king, and an arrested individual has virtually no protection against the sophisticated apparatus of government.

The rights of the accused were specifically guaranteed in *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602. The court established specific criteria to assure that the constitutional rights of a suspect were not violated by interrogating officers. *Miranda's* offspring have applied these criteria to a variety of situations. In *Michigan v. Mosley* (1975), 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 3321, the court ruled that police may resume questioning a suspect who has invoked his right to remain silent if the right to cut off the interrogation has been scrupulously honored. In *Edwards v. Arizona* (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880, the United States Supreme Court held that a suspect's confession was inadmissible because he was interrogated after his request for counsel had been ignored. *Edwards* held that reinterrogation of a suspect was proper only if the suspect initiated the reinterrogation. Although the court had declined to expand the protection afforded by *Miranda* and *Edwards* (*Oregon v. Bradshaw* (1983), ___ U.S. ___, 77 L. Ed. 2d 405, 103 S. Ct. 2830; *Solem v. Stumes* (1984), ___ U.S. ___, 79 L.Ed. 2d 579, 104 S. Ct. 1338, it is clear that a suspect's statement is inadmissible if the statement was taken after a request for counsel was not honored by the interrogators.

This principle is not easily applied to situations where the accused makes a somewhat equivocal request for the assistance of counsel during interrogation. In the case at bar, Smith was asked if he wanted an attorney, and he replied, "Uh, yeah, I'd like to do that." Smith later stated, "Yeah and no, uh, I don't know what's what really," and finally stated: "All right. I'll talk to you then." The State argues that Smith's statement was not sufficiently definite to invoke the protections of *Miranda*. Our research has detected two schools of thought concerning the equivocal request for counsel.

The first position holds that any mention of an attorney, no matter how ambiguous, triggers the protections of *Miranda* and prevents police from asking questions until counsel is provided. (See *People v. Superior Court* (1975), 15 Cal. 3d 729, 548 P.2d 1390, 125 Cal. Rptr. 798; *Singleton v. State* (Fla. App. 1977), 344 So. 2d 911.) This expansive interpretation of *Miranda* was properly rejected by this court in *People v. Krueger* (1980), 82 Ill. 2d 305. In *Krueger*, this court ruled that the accused's statement of "maybe I need an attorney" did not constitute an effective request for assistance of counsel. The court noted:

"We do not believe, however, that the Supreme Court intended by this language that every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel. ***

*** We hold that the officers did not violate defendant's *Miranda* rights, for, in this instance, a more positive indication or manifestation of a desire for an attorney was required than was made here." 82 Ill. 2d 305, 311-12.

In the case at bar, we agree with the reasoning of the appellate court. We believe that Smith's statements, considered in total, were ambiguous, and did not effectively invoke his right to counsel.

A second approach is grounded in the *Edwards* decision, where the court noted: "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has *clearly asserted* his right to counsel." (Emphasis added.) (*Edwards v. Arizona* (1981), 451 U.S. 477, 485, 60 L. Ed. 2d 378, 387, 101 S. Ct. 1880, 1885; (see also *State v. Moulds* (Idaho 1983), 673 P.2d 1074.) We believe that Steven Smith did not *clearly assert* his right to counsel. We have reviewed Illinois cases dealing with this issue (*People v. Kendricks* (1984), 121 Ill. App. 3d 442; *People v. Hammock* (1984), 121 Ill. App. 3d 874; *People v. Martin* (1984), 121 Ill. App. 3d 196) and find the invocation of a suspect's *Miranda* rights turn on the unique facts of each case. We believe that Smith's remarks did not trigger his right to counsel, and that the trial court did not err when it allowed his statement to be admitted into evidence.

Finally, defendant argues that the pretrial statements of Williams and Logan were improperly used as substantive evidence, rather than for impeachment purposes. In Illinois, it is well settled that prior inconsistent statements are only admissible for the limited purpose of impeachment. (*People v. Bailey* (1975), 60 Ill. 2d 37, 42-43.) In the case at bar, the defendant argues that the State's Attorney utilized the pretrial statements of Williams and Logan in violation of *Bailey*. We need not consider the merits of this argument, because we agree with the majority opinion of the appellate court that the error, if any, must be considered harmless. Two of the appellate court judges reached this conclusion, and the third justice dissented on this issue. We believe that the error, if any, was harmless, because we have determined that the defendant's confession was properly admitted into evidence, and this evidence was surely sufficient to convict him.

We therefore conclude that the trial court did not err when it allowed Smith's confession to be admitted into evidence. We now affirm the judgment of the appellate court.

Judgment affirmed.

JUSTICE SIMON, dissenting:

Because I find the defendant's statement indicating a desire to speak through counsel to be unambiguous and at the same time find no evidence of a voluntary renunciation of his right to do so, I would remand the cause for a new trial.

The Supreme Court has emphasized that when a suspect in custody invokes his fifth amendment right to counsel and does not knowingly and voluntarily initiate communication at a later time, the police are not permitted to continue to interrogate him until counsel is provided. (*Oregon v. Bradshaw* (1983), ___ U.S. ___, 77 L. Ed. 2d 405, 103 S. Ct. 2830; *Edwards v. Arizona* (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880; see *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602.) The majority's reliance on "Smith's statements, considered in total" (slip op. at 9), confuses the two distinct questions that must be asked: whether the defendant asserted his right to counsel in the first place and whether, assuming that he did so, he later validly waived that right.

The statements which the majority claims rendered the request for counsel ambiguous were not part of the request and did not precede it but came later, following continued recitation of the *Miranda* warnings and a paraphrasing of the meaning of those warnings by the interrogator. As the

Edwards and *Bradshaw* opinions illustrate, statements made by a defendant after he invokes his right to counsel are relevant in determining whether he waived the right following the invocation. However, they are valueless in deciding whether an earlier statement made by the defendant amounts to an assertion of the right to counsel. A statement either is such an assertion or it is not, and in the event that it is, the interrogating officer must react immediately to it, either by ceasing all questioning (see, *e.g.*, *Miranda v. Arizona* (1966), 384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 707, 86 S. Ct. 1602, 1612; *People v. Superior Court* (1975), 15 Cal. 3d 729, 736, 542 P.2d 1390, 1394, 125 Cal. Rptr. 798, 802, *cert. denied* (1976), 429 U.S. 816, 50 L. Ed. 2d 76, 97 S. Ct. 58; *Singleton v. State* (Fla. App. 1977), 344 So. 2d 911, 912-13; *State v. Nash* (1979), 119 N.H. 728, 731, 407 A.2d 365, 367) or by limiting further questioning strictly to an attempt to clarify any *bona fide* doubt the officer may still have as to whether the defendant desires counsel (*State v. Moulds* (1983), 105 Idaho 880, ___, 673 P.2d 1074, 1083; see *People v. Krueger* (1980), 82 Ill. 2d 305, 311, *cert. denied* (1981), 451 U.S. 1019, 69 L. Ed. 2d 390, 101 S. Ct. 3009). No authority, and no logic, permits the interrogator to proceed with his *Miranda* warnings and his questioning, on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all. That, however, is what the majority opinion permits the State to do.

The focus of a reviewing court should be on whether the defendant's alleged assertion of his right to counsel, standing alone or in conjunction with his *earlier* statements or actions insofar as they shed light on his desires, were sufficient to be understood as such an invocation by a reasonable man in the interrogating officer's position. The Supreme Court in *Miranda* said that if a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no [further] questioning." (384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 707, 86 S. Ct. 1602, 1612.) Although many jurisdictions have interpreted this to mean that any indication by a defendant that he might wish to consult an attorney is sufficient to trigger the right to counsel (see, *e.g.*, *People v. Superior Court* (1975), 15 Cal. 3d 729, 735-36, 542 P.2d 1390, 1394-95, 125 Cal. Rptr. 798, 802-03, *cert. denied* (1976), 429 U.S. 816, 50 L. Ed. 2d 76, 97 S. Ct. 58; *Singleton v. State* (Fla. App. 1977), 344 So. 2d 911, 912; *State v. Nash* (1979), 119 N.H. 728, 731, 407 A.2d 365, 367; *Ochoa v. State* (Tex. Crim. App. 1978), 573 S.W.2d 796, 800), this court has required, as the majority has noted, that a statement invoking the right be at least sufficiently free of indecision or double meaning to reasonably inform the authorities that he wishes to speak to counsel (see *People v. Krueger* (1980), 82 Ill. 2d 305, 311, *cert. denied* (1981), 451 U.S. 1019, 69 L. Ed. 2d 390, 101 S. Ct. 3009). The *Krueger* opinion stressed, however, that "assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity." 82 Ill. 2d 305, 311.

The facts presented by *Krueger* are distinguishable, for with the possible exception of the word "uh" the defendant's statement in this case was neither indecisive nor ambiguous: "Uh, yeah, I'd like to do that." The statement

came in answer to the warning that Smith had the right to have an attorney present while being questioned, and Smith had volunteered nothing previously which might have cast doubt on his response that he wished "to do that" rather than face the interrogator on his own. His only previous statement to the officer which is of any significance in this regard is an assertion that "she" warned him that the police would "railroad" him and advised him to get a lawyer before submitting to interrogation. I fail to understand how the officer could have mistaken the defendant's meaning, and no justification is given or is apparent for his proceeding through to the end of the *Miranda* warnings and in the course of doing so misrepresenting to Smith the meaning of those warnings by the following admonition: "You either have to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to." This communication, even if inadvertent, clearly imparted to the defendant the warning that he had to talk to the interrogator and was seriously misleading.

This court has noted that, "[i]n the intimidating atmosphere of an interrogation room, many otherwise hardy individuals, except those with exposure to and experience with the procedure, may succumb, even after assertions of their right to remain silent and right to have counsel, to the implication that 'silence in the face of accusation is itself damning.' " (*People v. Medina* (1978), 71 Ill. 2d 254, 260.) In this regard, I find it particularly significant that Smith, who was apparently in police custody for the first time in his life and admitted that he did not "know what's what," agreed to talk to the police only after he was told, ostensibly by way of explaining the *Miranda* warnings, that he had no other choice. *Miranda* warnings are designed to assist defendants in understanding and asserting their fifth amendment rights, not to provide another source of pressure on them to surrender those rights. Smith was entitled to receive his *Miranda* warnings without having them turn into an endurance contest at his expense (*People v. Hammock* (1984), 121 Ill. App. 3d 874, 879-80) or a means of eliciting a confession from him against his will. When he indicated his desire to have counsel he should have been taken at his word, and further representations or warnings to him or discussion with him should have ceased.

GOLDENHERSH and MORAN, JJ., join in this dissent.

NO. 4-82-0236

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STEVEN E. SMITH, Defendant-Appellant.	)	Appeal from Circuit Court County of Logan No. 81CF73 Honorable John T. McCullough, Judge Presiding.

JUSTICE MILLS delivered the opinion of the court:

Armed robbery at McDonald's.

Jury trial--guilty--9 years.

On appeal, we are faced with questions involving Miranda warnings, the prosecutor's examination of two witnesses, and whether those witnesses were court's or hostile.

In summa, we affirm.

Early in the morning on November 19, 1981, an armed robber took approximately $2,600 from the McDonald's restaurant in Lincoln, Illinois. Terry Logan, Greg Williams, and Karen Vale, all of whom were McDonald's employees, were eyewitnesses to the crime. The robber was masked and did not speak. None of the three were initially able to identify him. Subsequently, however, Logan identified the defendant, Steve Smith--whom Logan had known prior to the robbery--as the perpetrator. Williams also told police that the robber reminded him of his cousin, Steve Smith.

Based upon these statements, the police obtained a search warrant for Smith's residence. After completing the search,

Smith was arrested and interviewed by Officers Vonderahe and Coombs of the Lincoln Police Department. The interview began as follows:

"Q Okay. Steve, I want to talk with you in reference to the armed robbery that took place at McDonalds restaurant on the morning of the 19th. Are you familiar with this?

A Yeah. My cousin Greg was.

Q Okay. But before I do that I must advise you of your rights. Okay? You have a right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?

A Uh. Chico told me to get my lawyer. Chico said you guys would railroad me.

Q Do you understand that as I gave it to you, Steve?

A Yeah.

Q If you do want to talk to me, I must advise you that whatever you say can and will be used as evidence against you in court. Do you understand that?

A Yeah.

Q You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?

A Uh, yeah. I'd like to do that.

Q Okay. If you want a lawyer and if you're unable to pay for one, a lawyer will be appointed to represent you free of cost. Do you understand that?

A Okay.

Q Do you wish to talk with me at this time without a lawyer being present?

A Yeah and no, uh, I don't know what's what really.

Q Well, you either have to agree to talk to me at this time without a lawyer present and if you do agree to talk with me without a lawyer being present you can stop any time you want to.

A All right. I'll talk to you then.

Q Okay. All you have to do is just tell me I don't want to talk to you anymore and that ends it. Okay?

A Okay."

Smith was then interrogated and admitted foreknowledge of the McDonald's robbery and that he had agreed to dispose of the plunder from the robbery for Terry Logan. Although he recounted in detail how the robbery was to take place, Smith strenuously denied that he was the robber. At one point in his statement, however, the following exchange took place:

"Q I can only tell you this much, Steve. *** [T]he only thing that can help you out now is the truth. Now if you committed the crime along with Logan, all right, you committed it. Then now's the time to straighten it out and the time to say I did it.

A All right. I -- all right. I committed it. I knew about the robbery. I knew about it long before it happened. I was gonna get rid of everything. ***."

Smith's motion to suppress these portions of his statement was denied.

On the day of trial, just prior to calling Logan and Williams as witnesses, the State's Attorney moved to have them declared

hostile or court's witnesses (apparently using the name interchangeably). In support of his motion, the State's Attorney noted the vacillation in their pretrial statements. The court declared both Logan and Williams to be hostile witnesses.

Smith alleges that this ruling, the prosecutor's examination of Logan and Williams at trial, and the denial of his motion to suppress require reversal of his conviction.

We disagree.

MOTION TO SUPPRESS

Smith's argument for suppression is that under Edwards v. Arizona (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880, once an accused requests assistance of counsel, the police must cease interrogation until counsel is present or the accused initiates further discussion. Smith contends that he requested counsel, none was provided, and he did not initiate further discussions.

Smith correctly states the holding of Edwards, but that case is inapplicable to the fact situation before this court. Smith never made an effective request for counsel so as to invoke the safeguards set forth in Edwards. Rather, he merely expressed an interest in obtaining counsel during the administration of the Miranda warnings and prior to the beginning of any interrogation. The interrogating officer completed the administration of the warnings and asked if Smith wished to speak without counsel. When Smith expressed some confusion about his rights, Officer Vonderahe explained that if defendant agreed to talk, the interview could be stopped at any time. At this point, Smith agreed to speak.

We find People v. Krueger (1980), 82 Ill. 2d 305, 412 N.E.2d 537, controlling. There, defendant initially waived his Miranda rights, but later stated, "Maybe I ought to have an attorney." The court held that this was not sufficient to invoke defendant's right to counsel. The facts here are even more compelling. In Krueger, defendant was fully aware of his Miranda rights and had executed a waiver when he made mention of an

attorney. Here, Smith had not even been given the full Miranda warnings when he stated that he would like an attorney. Although Smith's statement, taken out of context, appears clear and unequivocal, when it is considered with other statements--as it should be--it is clear that Smith was undecided about exercising his right to counsel.

Clearly, Officer Vonderahe did not consider any such request to have been made. He asked Smith for clarification of his statement. Under Krueger, an officer's subjective belief is entitled to some consideration in determining whether a request for counsel has been made. We think the interrogating officers' actions here were reasonable. Smith's statements were not a request for counsel during interrogation. Indeed, interrogation had not begun. There was merely an indecisive inquiry into the right to counsel. When Smith indicated a desire to cease interrogation once it had begun, his wishes were promptly complied with.

No error.

WITNESSES: COURT'S OR HOSTILE?

There was some understandable confusion below between these two concepts. This court recently held that a party seeking to call a witness as a court's witness must show that (1) he cannot vouch for the witness' credibility; (2) the testimony will relate to direct issues in the case; and (3) the testimony is necessary to prevent a miscarriage of justice. (People v. Church (1981), 102 Ill. App. 3d 155, 429 N.E.2d 577.) In order to have a witness declared a hostile witness, it must first be demonstrated that (a) he is an occurrence witness; (b) he is being called in good faith; and (c) the party calling him is surprised by his testimony. (Church.) Aside from this, Church indicated that the primary distinction between the two concepts is that a hostile witness may be impeached with prior inconsistent statements, while such impeachment of a court's witness is not permitted.

In view of the supreme court's more recent opinion in People v. Weaver (1982), 92 Ill. 2d 545, 442 N.E.2d 255, the

continuing validity of this latter distinction is doubtful. Weaver stated that a court's witness may be impeached with a prior inconsistent statement if he says something which affirmatively damages the party calling him. On the facts before it, the court found no affirmative damage and held impeachment was improper. Here, there was affirmative damage. Logan and Williams both stated that defendant was not the robber.

As the issue here is whether the State was properly allowed to impeach Logan and Williams with prior inconsistent statements, we will consider whether a proper foundation for calling Logan and Williams as either court's or hostile witnesses was presented. In short, we hold that there was a sufficient showing to declare them court's witnesses. Both Logan and Williams had made inconsistent statements prior to trial and it was uncertain how they would testify at trial. It is also readily apparent that their testimony would relate directly to the issues in the case. They were, after all, eyewitnesses to the armed robbery. And, for this same reason, their testimony was necessary to prevent a miscarriage of justice.

The foundation for calling the two as hostile witnesses was not present, however. Logan and Williams were, of course, occurrence witnesses. And there is no allegation that the State acted in bad faith in calling them. But, it could not be said--at least when the court declared Logan and Williams hostile prior to trial--that the State was surprised by their testimony. They had not testified to anything. Nor did any surprise occur when Logan and Williams did testify. Both gave testimony consistent with some prior statements but inconsistent with others. The State may have been disappointed, but it was not surprised. See Seibutis v. Smith (1980), 83 Ill. App. 3d 1010, 404 N.E.2d 950.

Thus, it would appear that although the end result achieved in denominating a witness a court's witness or a hostile witness is the same, a difference between the concepts still exists.

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Thus, it would appear that although the end result achieved in denominating a witness a court's witness or a hostile witness is the same, a difference between the concepts still exists. Declaring someone a court's witness is appropriate when the State has reason, prior to the witness testifying, to doubt his credibility. There is no way to satisfy the foundation requirement for declaring a witness hostile until after the witness has begun to testify. Thus, the trial judge here incorrectly designated Logan and Williams as hostile witnesses, but the error does not require reversal. The State was affirmatively damaged by their testimony and they could be impeached with prior inconsistent statements in any event. See Weaver.

We turn then to the question of whether the manner in which the impeachment of Logan and Williams was carried out was an improper attempt to put the substance of their prior statements before the jury. We agree with Smith that such use of prior inconsistent statements is to be condemned (People v. Bailey (1975), 60 Ill. 2d 37, 322 N.E.2d 804), but note that Smith never objected to the form of examination at trial and only raised objections to the examination of Logan in his post-trial motion. Thus, in the absence of plain error, this court will invoke the doctrine of waiver and decline to consider any error. People v. Pickett (1973), 54 Ill. 2d 280, 296 N.E.2d 856; People v. Baske (1978), 66 Ill. App. 3d 590, 383 N.E.2d 1322 (dealing with failure to object to the State's failure to perfect impeachment).

We do not believe this error rose to the level of plain error. Primarily, the error was not prejudicial. Smith bases his argument on the fact that in numerous instances, the State's Attorney made reference to a prior statement by Logan or Williams before they had made an inconsistent statement at trial. While this is true, it belies the fact that the prior statements were by and large acknowledged by both witnesses. The examination at the critical points--where Logan and Williams stated that Smith was not the robber--was in the proper form. Even where the examination was not in the proper form, little harm was done. The correct approach would have been to ask a leading question and when the witness declined to adopt the suggested answer, impeach him with the prior inconsistent statement (which was the basis for the leading question in the first place). The method adopted by the prosecution ("didn't you say" as opposed to "isn't it true") is certainly not to be encouraged, but we cannot say that it amounts to plain error.

Additionally, there was strong circumstantial evidence against Smith--even without the testimony of Logan and Williams. First, Smith matched the general description given by the third eyewitness; second, he possessed a somewhat uncommon weapon (a chrome-plated .44 magnum revolver) similar to the one used

by the robber; third, clothing similar to that Karen Vale described the robber as wearing was found in defendant's possession; and, fourth, evidence tended to establish that Smith possessed some of the proceeds of the robbery. Furthermore, Smith admitted advance knowledge of the robbery and to possession of the proceeds. While he also denied participation in the actual robbery, the jury was not required to believe him.

The evidence in this case was not close, Smith was not prejudiced, and we decline to consider the error in the method by which Logan and Williams were examined.

Affirmed.

GREEN, J., concurs. WEBBER, P.J., partially concurs and dissents.

PRESIDING JUSTICE WEBBER, concurring in part and dissenting:

I agree with most of what is said in the principal opinion. There was no violation of Miranda, and in view of Weaver our opinion in Church is of doubtful validity. The entire matter was set to rest by the change in Supreme Court Rule 238 (87 Ill. 2d R. 238) effective April 1, 1982. On whatever theory, impeachment of Logan and Williams was proper.

However, even a casual reading of this record demonstrates that the State's Attorney was not attempting impeachment but was putting the prior out-of-court statements before the jury as substantive evidence. I disagree that this is not plain error.

The theory of impeachment is that of undermining the credibility of the witness through the use of the prior inconsistent statement. It is not intended to place substantive evidence before the jury. People v. Bailey (1975), 60 Ill. 2d 37, 322 N.E.2d 804.

The State's Attorney appeared little concerned with the testimony of Logan and Williams before the jury; he was primarily concerned with their out-of-court declarations. His examination of them consisted largely of demanding that they affirm or deny these declarations and in his closing argument he made several references to them and intimated that they were substantive evidence. The State's case was almost entirely circumstantial with the exception of the defendant's own statements. The State's case was strong, but not overwhelming. The defendant's identification came only from Logan and Williams, both of them apparently deeply involved in the crime, and no one ever identified the items seized from the defendant as being those either used or taken in the robbery.

I would reverse and remand for a new trial.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. 84-5332

STEVEN SMITH, Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The People of the State of Illinois ask this Court to deny the petition for writ of certiorari to review the judgment of the Supreme Court of Illinois affirming petitioner's conviction for armed robbery because it does not present an issue worthy of review.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at People v. Smith, 102 Ill.2d 365, 465 N.E.2d___ (1984). The opinion of the Appellate Court of Illinois for the Fourth District is reported at People v. Smith, 113 Ill.App.3d 305, 447 N.E.2d 556 (4th Dist. 1983).

JURISDICTION

The jurisdictional requisites are set forth in the petition but, as treated more fully in the following argument, the People of Illinois maintain that petitioner has not provided any reason for this Court to exercise its discretion to grant the Petition for Writ of Certiorari.

OPPOSITION BRIEF

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 84-5332

STEVEN SMITH,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Edwards v. Arizona is undermined where petitioner first expressed some confusion about his rights before interrogation began, but then agreed to speak.

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STATEMENT OF THE CASE

Petitioner Steven Smith was convicted of armed robbery and sentenced to nine years in prison in April of 1982. In the midst of trial, petitioner had made an oral motion to suppress the confession he gave to police on the day of his arrest. He argued that, though he had invoked his right to counsel, the police continued the interrogation and thereby obtained the inculpatory statements from him.

This claim was rejected by the trial court, by a unanimous Illinos Appellate Court on direct review, and by a 4-3 decision by the Illinois Supreme Court on discretionary review. At each level it was determined that petitioner had not made an effective request for counsel so as to invoke this Court's safeguards in Edwards v. Arizona, 451 U.S. 477 (1981).

Now petitioner seeks further review from this Court on the same question. The Illinois Supreme Court stayed its mandate pending resolution of the petition.

REASON FOR DENYING THE WRIT

EDWARDS V. ARIZONA IS NOT UNDERMINED WHERE A SUSPECT FIRST EXPRESSED SOME CONFUSION ABOUT HIS RIGHTS BEFORE INTERROGATION BEGAN BUT THEN AGREED TO SPEAK.

This Court has declared that if a suspect indicates "in any manner" that he wishes to consult with an attorney before speaking, there can be no questioning, Miranda v. Arizona, 348 U.S. 436, 444-445 (1966); and that any statement taken after a request for counsel was ignored by the interrogators is inadmissible. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). In the case at bar, Smith claims that Edwards was violated because, he says, before he confessed to the robbery he first made a request for counsel that was dishonored. However, the investigators at the time of the interview did not feel that a request for counsel had been made. And at each level -- at trial, on direct appeal, and on discretionary appeal to the State's highest court -- the Illinois courts declared that the investigators were right.

The Illinois Supreme Court relied on People v. Krueger, 82 Ill.2d 305, 412 N.E.2d 537 (1980), cert. denied, Krueger v. Illinois, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 390 (1981) in considering whether Smith had "in any manner" requested counsel. The Krueger rule is that, although an assertion for counsel need not be explicit, not every reference to an attorney -- no matter how vague, indecisive, or ambiguous -- should constitute an invocation of the right to counsel.

The Illinois Supreme Court reached the conclusion that Smith had not requested counsel before confessing based on the following interview:

> Q. Steve, I want to talk with you in reference to the armed robbery that took place at McDonald's Restaurant on the morning of the 19th. Are you familiar with this?
>
> A. Yeah. My cousin Greg was.
>
> Q. Okay. But before I do I must advise you of your rights. Okay? You have a right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?
>
> A. Uh. She told me to get my lawyer. She said you guys would railroad me.
>
> Q. Do you understand that as I gave it to you, Steve?
>
> A. Yeah.
>
> Q. If you do want to talk to me I must advise you that whatever you say can and will be used against you in court. Do you understand that?
>
> A. Yeah.
>
> Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?
>
> A. Uh, yeah. I'd like to do that.
>
> Q. Okay. If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?
>
> A. Okay.
>
> Q. Do you wish to talk to me at this time without a lawyer being present?
>
> A. Yeah and no, uh, I don't know what's what really.

> Q. Well. You either have to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.
>
> A. All right. I'll talk to you then.

Smith, 102 Ill.2d at 368-369.

The Illinois court explained that the principle of Miranda and Edwards -- that a suspect's statement is inadmissible if the statement was taken after a request for counsel was not honored by the interrogators -- is difficult to apply where there is equivocation and that the interview in this case demonstrated such equivocation that Smith's remarks did not trigger his right to counsel.

Petitioner's version of events zeroes in on a single question and answer and ignores what actually took place during the interview. The appellate court on direct appeal explained the infirmity in his argument:

> Here, Smith had not even been given the full Miranda warnings when he stated that he would like an attorney. Although Smith's statement, taken out of context, appears clear and unequivocal, when it is considered with the other statements -- as it should be -- it is clear that Smith was undecided about exercising his right.
>
> * * *
>
> Clearly, Officer Vonderahe did not consider any such request to have been made. He asked Smith for clarification of his statement.
>
> * * *
>
> Indeed, interrogation had not begun. There was merely an indecisive inquiry into the right to counsel. When Smith [later] indicated a desire to cease interrogation once it had begun, his wishes were promptly complied with.

Smith, 447 N.E.2d at 559 (Ill.App. 4th Dist. 1983). Thus, the record did not paint the picture of a suspect whose will was broken by unrelenting interrogation. Rather, it portrayed a suspect who initially "expressed some confusion about his rights" but then "agreed to speak." Smith, 447 N.E.2d at 558 (Ill.App. 4th Dist. 1983).

The conclusion of the Illinois courts is in keeping with existing authority. Examples of instances where similar statements did not require the termination of questioning are: Krueger, 412 N.E.2d at 538, where a suspect speculated that "maybe I ought to have an attorney;" Collins v. Fogg, 425 F.Supp. 1339 (E.D.N.Y.), aff'd, 559 F.2d 1202 (2d Cir.) cert. denied, 434 U.S. 869 (1977), where the suspect asked the police officer if he could recommend an attorney; State v. Phillips, 563 S.W.2d 47 (Mo. 1978), cert. denied, 443 U.S. 904 (1979), where the suspect explained that he did not know if he should speak to an attorney; People v. Whitman, 510 P.2d 432 (Colo. 1973) where the suspect asked where and how to contact a lawyer but did not follow up with an attempt to reach counsel; United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974) where the suspect asked the police if he was in trouble and if he needed counsel; State v. Killay, 430 A.2d 418 (R.I. 1981) where the suspect asked to speak to "someone"; and State v. Cambell, 612 S.W.2d 371 (Mo. App. 1981) where the suspect suggested that he "felt he needed help."

Edwards has not been undermined. The rejection of petitioner's claim by the Illinois courts is consistent with Miranda and Edwards. There is nothing this Court could add by accepting review. This Court should exercise its discretion to deny the petition.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for discretionary review because the issue it presents is not worthy of this Court's attention.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. 84-5332

STEVEN SMITH,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

CERTIFICATE OF SERVICE AND STATEMENT OF TIMELY FILING

I, Mark L. Rotert, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 160 North LaSalle Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Alexander Stevas, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served.

I further state that this mailing took place on September 25, 1984, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: _____
MARK L. ROTERT
Assistant Attorney General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

SUBSCRIBED and SWORN to
before me this 25th day of
September, 1984.

_____
NOTARY PUBLIC

OPINION

SUPREME COURT OF THE UNITED STATES

STEVEN SMITH *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 84-5332. Decided December 10, 1984

PER CURIAM.

The petitioner Steven Smith was convicted of armed robbery and sentenced to a 9-year prison term. He contends that the police improperly elicited a confession from him after he clearly had requested the assistance of counsel, and that the trial court's refusal to suppress the confession therefore violated *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Edwards* v. *Arizona*, 451 U. S. 477 (1981). The Illinois Supreme Court held that Smith's responses to continued police questioning rendered his initial request for counsel "ambiguous," and that the officers therefore were not required to terminate their questioning. 102 Ill. 2d 365, 373–374, 466 N. E. 2d 236, 240 (1984). Under *Miranda* and *Edwards*, however, an accused's post-request responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel. Finding no ambiguity in Smith's initial request, we accordingly grant the petition and reverse.

I

Shortly after his arrest, 18-year-old Steven Smith was taken to an interrogation room at the Logan County Safety Complex for questioning by two police detectives. The session began as follows:

> "Q. Steve, I want to talk with you in reference to the armed robbery that took place at McDonald's restaurant on the morning of the 19th. Are you familiar with this?
> "A. Yeah. My cousin Greg was.
> "Q. Okay. But before I do that I must advise you of your rights. Okay? You have a right to remain silent.

You do not have to talk to me unless you want to do so. Do you understand that?
"A. Uh. She told me to get my lawyer. She said you guys would railroad me.[1]
"Q. Do you understand that as I gave it to you, Steve?
"A. Yeah.
"Q. If you do want to talk to me I must advise you that whatever you say can and will be used against you in court. Do you understand that?
"A. Yeah.
"Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?
"A. *Uh, yeah. I'd like to do that.*
"Q. Okay." 102 Ill. 2d, at 368–369, 466 N. E. 2d, at 238 (emphasis in opinion).

Instead of terminating the questioning at this point, the interrogating officers proceeded to finish reading Smith his *Miranda* rights and then pressed him again to answer their questions:

"Q. . . . If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?
"A. Okay.
"Q. Do you wish to talk to me at this time without a lawyer being present?
"A. *Yeah and no, uh, I don't know what's what, really.*
"Q. *Well. You either have to talk to me this time without a lawyer being present* and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.

[1] According to the Illinois Supreme Court, the "she" that Smith referred to was an unidentified woman named Chico. 102 Ill. 2d 365, 368–369, 466 N. E. 2d 236, 238 (1984).

"Q. All right. I'll talk to you then." *Id.*, at 369, 466 N. E. 2d, at 238 (emphasis in opinion).

Smith then told the detectives that he knew in advance about the planned robbery, but contended that he had not been a participant. After considerable probing by the detectives, Smith confessed that "I committed it," but he then returned to his earlier story that he had only known about the planned crime. *Id.*, at 369–370, 466 N. E. 2d, at 238. Upon further questioning, Smith again insisted that "I wanta get a lawyer." *Id.*, at 370, 466 N. E. 2d, at 238. This time the detectives honored the request and terminated the interrogation.

Smith moved at trial to suppress his incriminating statements, 1 Record 45, but the trial judge denied the motion, 4 Record 231. A transcript of the interrogation was introduced as part of the State's case-in-chief, and Smith was convicted.

In affirming Smith's conviction, the Appellate Court of Illinois for the Fourth District acknowledged that Smith's first request for counsel "appears clear and unequivocal." 113 Ill. App. 3d 305, 310, 447 N. E. 2d 556, 559 (1983). The court concluded, however, that "when [the request] is considered with other statements—as it should be—it is clear that Smith was undecided about exercising his right to counsel" and "never made an effective request for counsel." *Id.*, at 309–310, 447 N. E. 2d, at 558–559. Rather, Smith had made "merely an indecisive inquiry into the right to counsel." *Id.*, at 310, 447 N. E. 2d, at 559.

The Illinois Supreme Court affirmed in a 4–3 vote. The majority agreed with the lower court that "Smith's statements, considered in total, were ambiguous, and did not effectively invoke his right to counsel." 102 Ill. 2d, at 373, 466 N. E. 2d, at 240. Specifically, the majority noted that although Smith stated "I'd like to do that" upon learning he had a right to his counsel's presence at the interrogation, Smith *subsequently* replied "Yeah and no, uh, I don't know what's what really," and "All right. I'll talk to you then." *Id.*, at

372, 466 N. E. 2d, at 240. In light of these subsequent remarks, the majority reasoned, "Steven Smith did not *clearly assert* his right to counsel." *Id.*, at 373, 466 N. E. 2d, at 240 (emphasis in original).

II

An accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him," unless he validly waives his earlier request for the assistance of counsel. *Edwards* v. *Arizona*, 451 U. S., at 484–485.[2] This "rigid" prophylactic rule, *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979), embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. See, *e. g.*, *Edwards* v. *Arizona*, *supra*, at 484–485 (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); *Miranda* v. *Arizona*, 384 U. S., at 444–445 (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further

[2] We have repeatedly emphasized this restraint on police interrogation. In addition to *Edwards*, see also *Solem* v. *Stumes*, —— U. S. ——, —— (1984); *Oregon* v. *Bradshaw*, —— U. S. ——, —— (1983) (*Edwards* set forth a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers . . ."); *Wyrick* v. *Fields*, 459 U. S. 42, 45–46 (1982) (*per curiam*); *Rhode Island* v. *Innis*, 446 U. S. 291, 298 (1980); *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979) (discussing the "rigid rule" that "an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease"); *Miranda* v. *Arizona*, 384 U. S. 436, 474 (1966) ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present"). Cf. *Michigan* v. *Mosley*, 423 U. S. 96, 105–106 (1975) (rule requiring termination of questioning upon accused's invocation of his right to silence prevents police from "persisting in repeated efforts to wear down [the accused's] resistance and make him change his mind").

discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. *Edwards* v. *Arizona*, *supra*, at 485, 486, n. 9.

This case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instance. On occasion, an accused's asserted request for counsel may be ambiguous or equivocal. As the majority and dissenting opinions below noted, courts have developed conflicting standards for determining the consequences of such ambiguities. See 102 Ill. 2d, at 372–373, 466 N. E. 2d, at 240; *id.*, at 375–377, 466 N. E. 2d, at 241–242 (Simon, J., dissenting).[3] We need not resolve this conflict in the instant case, however, because the judgment of the Illinois Supreme Court must be reversed irrespective of which standard is applied.

The conflict among courts is addressed to the relevance of alleged ambiguities or equivocations that either (1) *precede* an accused's purported request for counsel, or (2) are part of the request *itself*. Neither circumstance pertains here, however. Neither the State nor the courts below, for example,

[3] Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. See, *e. g.*, *People* v. *Superior Court*, 15 Cal. 3d 729, 735–736, 542 P. 2d 1390, 1394–1395 (1975), cert. denied, 429 U. S. 816 (1976); *Ochoa* v. *State*, 573 S. W. 2d 796, 800–801 (Tex. Crim. App. 1978). Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. See, *e. g.*, *People* v. *Krueger*, 82 Ill. 2d 305, 311, 412 N. E. 2d 537, 540 (1980) ("[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity," but not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel"), cert. denied, 451 U. S. 1019 (1981). Still others have adopted a third approach, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel. See, *e. g.*, *Thompson* v. *Wainwright*, 601 F. 2d 768, 771–772 (CA5 1979); *State* v. *Moulds*, 105 Idaho 880, 888, 673 P. 2d 1074, 1082 (App. 1983).

have pointed to anything Smith previously had said that might have cast doubt on the meaning of his statement "I'd like to do that" upon learning that he had the right to his counsel's presence.[4] Nor have they pointed to anything inherent in the nature of Smith's actual request for counsel that reasonably would have suggested equivocation. As Justice Simon noted in his dissent below, "with the possible exception of the word 'uh' the defendant's statement in this case was neither indecisive nor ambiguous: 'Uh, yeah, I'd like to do that.'" *Id.*, at 377, 466 N. E. 2d, at 242. And the Illinois Appellate Court for the Fourth District itself acknowledged that the statement "appears clear and unequivocal." 113 Ill. App. 3d, at 310, 447 N. E. 2d, at 559.[5]

The courts below were able to construe Smith's request for counsel as "ambiguous" *only* by looking to Smith's *subsequent* responses to continued police questioning and by concluding that, "considered in total," Smith's "*statements*" were equivocal. 102 Ill. 2d, at 373, 466 N. E. 2d, at 240 (emphasis added); see also 113 Ill. App. 3d, at 310, 447 N. E. 2d, at 559.[6] This line of analysis is unprecedented and untenable.

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[4] Indeed, as Justice Simon noted in his dissent below, Smith's "only previous statement to the officer which is of any significance in this regard is an assertion that 'she' warned him that the police would 'railroad' him and advised him to get a lawyer before submitting to interrogation." 102 Ill. 2d, at 377, 466 N. E. 2d, at 242; see *supra*, at 2. Far from creating "ambiguity" concerning Smith's subsequent request, this statement could only have reinforced the clarity of Smith's invocation of his right to counsel.

[5] JUSTICE REHNQUIST in his dissent asserts that the trial judge "implicitly concluded that petitioner's initial statement was not a clear request," *post*, at ——, and criticizes the Court for "relitigat[ing]" this "essentially factual inquiry," *id.*, at ——. As this argument suggests, the trial judge did not discuss the clarity of Smith's request, but instead simply denied without comment Smith's motion to suppress. 4 Record 231. In fact, the only "finding" made by the state courts with respect to Smith's initial request was that it did indeed appear to be "clear and unequivocal." See *supra* this page.

[6] The Illinois Court of Appeals for the Fourth District also suggested that it was significant that Smith's request came *during* the administration of *Miranda* warnings: "[H]e merely expressed an *interest* in obtaining counsel during the administration of the *Miranda* warnings and prior to the beginning of any interrogation. . . . Smith's statements were not a request for counsel during interrogation. Indeed, interrogation had not begun." 113 Ill. App. 3d, at 309–310, 447 N. E. 2d, at 558–559 (emphasis in original). JUSTICE REHNQUIST in his dissent similarly contends that the authorities need not stop their questioning if an accused requests counsel prior to or during the *Miranda* warnings. See *post*, at ——, ——. Such reasoning is plainly wrong. A request for counsel coming "at *any* stage of the process" requires that questioning cease until counsel has been provided. *Miranda* v. *Arizona*, 384 U. S., at 444–445 (emphasis added).

As Justice Simon emphasized below, "[a] statement either is such an assertion [of the right to counsel] or it is not." 102 Ill. 2d, at 375, 466 N. E. 2d, at 241. Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.[7]

The importance of keeping the two inquiries distinct is manifest. *Edwards* set forth a "bright-line rule" that *all* questioning must cease after an accused requests counsel. *Solem* v. *Stumes*, —— U. S. ——, —— (1984). In the ab-

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[7] The dissent contends that the questioning here was "entirely consistent" with the proscriptions of *Edwards* and *Oregon* v. *Bradshaw*, *supra*. *Post*, at ——. In those cases, the dissent argues, the authorities immediately terminated their questioning once the suspects had invoked their right to counsel, but then sought "to resume interrogation at a later time." *Id.*, at ——. In this case, on the other hand, the detectives did not even *initially* terminate their questioning. In such circumstances, the dissent proclaims, it is proper to consider "the entire flavor of the colloquy." *Id.*, at ——. To the extent the dissent suggests that an accused's Fifth Amendment right to counsel should turn on whether the authorities initially honor his request, we reject this approach as palpably untenable under *Edwards*. Whether in the same interrogating session or in subsequent sessions, the so-called "flavor" of an accused's request for counsel cannot be dissipated by continued police questioning.

sence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching"—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. *Oregon* v. *Bradshaw*, 462 U. S. ——, —— (1983); *Fare* v. *Michael C.*, 442 U. S., at 719. With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation." *Edwards* v. *Arizona*, 451 U. S., at 484. Using an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. "No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all." 102 Ill. 2d, at 376, 466 N. E. 2d, at 241 (Simon, J., dissenting).[6]

[6]Most of the dissent is devoted to an effort at demonstrating that the detectives did not *actually* extract Smith's confession through trickery or coercion. See *post*, at ——– ——. This effort is of course beside the point, because the rule we announced in *Edwards* and which we follow today is a prophylactic safeguard whose application does not turn on whether coercion in fact was employed. Nevertheless, the actual course of the subsequent interrogation in this case reinforces our concern that, absent a bright-line rule requiring an immediate cessation of questioning, an accused may be "badgered" to speak as a result of police "overreaching." See *supra*, at 7. As Justice Simon noted in his dissent below:

"I fail to understand how the officer could have mistaken the defendant's meaning, and no justification is given or is apparent for his proceeding through to the end of the *Miranda* warnings and in the course of doing so misrepresenting to Smith the meaning of those warnings by the following admonition: 'You either have to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.' This communication, even if inadvertent, clearly imparted to the defendant the warning that he had to talk to the interrogator and was seriously misleading.

". . . In this regard, I find it particularly significant that Smith, who was apparently in police custody for the first time in his life and admitted that he did not 'know what's what,' agreed to talk to the police only after he was told, ostensibly by way of explaining the *Miranda* warnings, that he had no other choice." 102 Ill. 2d, at 377–378, 466 N. E. 2d, at 242.

The interrogation here bore a substantial similarity to the one condemned in *Edwards* v. *Arizona*, where the accused after requesting counsel was told that "he had" to talk to his interrogators. 447 U. S., at 479. It was precisely such "badger[ing]" that the *Edwards* safeguard was designed to prevent. See *Oregon* v. *Bradshaw*, 462 U. S., at ——.

III

Our decision is a narrow one. We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself, nor do we decide the consequences of such ambiguity or equivocation. We hold only that, under the clear logical force of settled precedent, an accused's *post-request* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver.

Accordingly, Smith's motion for leave to proceed *in forma pauperis* is granted, the petition for a writ of certiorari is granted, the judgment of the Illinois Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

OPINION

SUPREME COURT OF THE UNITED STATES

STEVEN SMITH *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 84–5332. Decided December 10, 1984

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

The Court seizes upon petitioner's seven-word response "Uh, yeah, I'd like to do that," rendered during a colloquy which in its entirety could not have taken five minutes, and proclaims that petitioner thereby clearly asserted his desire to consult with an attorney before speaking to the police. In so doing, it decides this essentially factual inquiry contrary to the three other courts that have considered the question: the Illinois Trial Court, the Illinois Appellate Court, and the Supreme Court of Illinois. Under the guise of applying a rule of law which, however correct in the abstract, has little application to these facts, the Court permits its certiorari jurisdiction to be used to relitigate the facts, and reaches a conclusion that is no more demonstrably correct than that reached by the Illinois courts.

There is no dispute that *Edwards* v. *Arizona*, 451 U. S. 477 (1981), requires *interrogation* to cease, if and when petitioner clearly asserts his right to the assistance of counsel. But here no "interrogation" was being conducted by the police; they were simply in the process of giving petitioner his full *Miranda* warnings. The very next statement by the police officer after petitioner's "clear assertion" of his right to counsel was to tell petitioner that "[i]f you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?" Surely the police should have continued to give petitioner his full warnings, even had his earlier response had the talismanic quality that the Court attributes to it.

The Court also assumes that the statement, "Uh, yeah. I'd like to do that," was announced affirmatively and without any tone of equivocation or inquiry. As the Illinois Appellate Court observed, the officer reading petitioner his rights did not understand the statement as a clear request. After first reading petitioner the fourth *Miranda* right, he immediately sought clarification by asking petitioner pointedly, "Do you wish to talk with me at this time without a lawyer being present?" To this query, petitioner responded, "Yeah and no, uh, I don't know what's what really." The trial judge, who was able to observe the demeanor of the officers testifying as to what took place and to listen to the tape of the interrogation, implicitly concluded that petitioner's initial statement was not a clear request.

The Court asserts that subsequent statements cannot be used to call into question the clarity of an earlier "request" for counsel. It may be that a crystal clear statement could not be rendered ambiguous by subsequent responses to questions seeking clarification. But statements are rarely that clear; differences between certainty and hesitancy may well turn on the inflection with which words are spoken, especially where, as here, a seven-word statement is isolated from the statements surrounding it. But in the ordinary give and take of statement and response in a colloquy such as this, I see no reason why the entire flavor of the colloquy—lasting less than five minutes—cannot be considered by the trier of fact.

Edwards v. *Arizona*, *supra*, is entirely consistent with this approach. In that case *Edwards*, after being informed of his *Miranda* rights, agreed to talk to police, but during his interrogation while discussing a possible "deal" said, "I want an attorney before making a deal." 451 U. S., at 478–479. The police then ceased questioning him, and he was returned to jail. The next morning two detectives went to the jail and asked to see Edwards; Edwards replied that he did not want to talk to anyone, but the guard told him that "he had" to talk

and then took him to meet with the detectives. The court said:

> "Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on [the preceding day], but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holdings of the state courts, Edwards insists that having exercised his right on the [preceding day] to have counsel present during interrogation, he did not validly waive that right on the [next day]. For the following reasons, we agree." *Id.*, at 482.

Our other cases applying *Edwards*, *Oregon* v. *Bradshaw*, —— U. S. —— (1983), and *Solem* v. *Stumes*, —— U. S. —— (1984), are cast in a similar mold; the suspect clearly asserts a right to counsel, questioning ceases, and then the police seek to resume interrogation at a later time. The facts of the present case simply do not fit that mold. The entire process by which petitioner was advised of his *Miranda* rights was transcribed in the few lines contained in the Court's opinion, *ante*, at 1–3; it simply slices a legal abstraction thinner than common sense will permit to conclude on the basis of this colloquy that it may not be used in its entirety to determine whether petitioner "clearly asserted" his right to counsel.

The Court apparently assumes that the officers were trying to trick or coerce petitioner into waiving his right to counsel. This is belied by the fact that, immediately after petitioner agreed to talk, the interrogating officer stated plainly, "All you have to do is just tell me I don't want to talk to you any more and that ends it." Subsequently, during the interrogation, when petitioner stated, "I don't want to talk to you no more. I want to get a lawyer," the police immediately ceased questioning and complied with this request.

The Court also implies that the officers badgered and coerced petitioner into changing his mind about obtaining a lawyer. In fact, between petitioner's initial statement and his indisputable expression of uncertainty, all that the officers did was advise him of the right to appointed counsel and asked him what he wanted to do:

> A. Uh, yeah. I'd like to do that.
> Q. Okay. If you want a lawyer and if you're unable to pay for one, a lawyer will be appointed to represent you free of cost. Do you understand that?
> A. Okay.
> Q. Do you wish to talk with me at this time without a lawyer being present?
> A. Yeah and no, uh, I don't know what's what really."

This can hardly be characterized as badgering.

The Court makes much of the officer's subsequent clarifying explanation that, "You either have to agree to talk to me at this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop any time you want to." The Court ignores the word "either." The sentence appears to be incomplete. It may well be that petitioner's response, "All right. I'll talk to you then," interrupted the completion of the sentence. The Court makes the unwarranted assumption that the officer was attempting to badger and overreach petitioner. Again, only the trier of fact can intelligently determine the import of the officer's statement.

Common sense suggests that the police should both complete reading petitioner his rights and then ask him to state clearly what he elects to do, even if he indicated a tentative desire while he was being informed of his rights. This is entirely consistent with applicable language in *Miranda* itself:

> "*Once warnings have been given, the subsequent procedure is clear.* If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U. S. 436, 473–474 (1966).

The reading of this short colloquy between petitioner and the police officer satisfies me that the police were faithfully attempting to follow our *Miranda* decision. The Court's opinion gives the impression that it is concerned about overreaching, badgering, and wearing down a suspect; but no fair reading of this five-minute transcript can lead to the conclusion that those factors were present here.